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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FLORETTA DUKES MCKENZIE,
SUPERINTENDENT OF SCHOOLS, *et al.*,
Petitioners,

v.

JUANITA M. JONES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Juanita M. Jones respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 833 F.2d 335 (1987).

STATEMENT OF THE CASE

Petitioners Floretta Dukes McKenzie, William J. Bedford, and the District of Columbia (the "School System") have asked this Court to review a decision of the United States Court of Appeals for the District of Columbia Circuit which prohibits the School System from administering a urinalysis test for illicit drugs upon Juanita

Jones unless, among other things, the urine test is capable of showing current drug impairment. The court's decision to limit drug testing to tests capable of detecting current impairment, however, is based on several factual admissions made by the School System, is sustainable on non-constitutional grounds and, accordingly, is not appropriate for review by this Court.

Specifically, the Court of Appeals' decision was based upon the following admissions by the School System: (1) that the only governmental interest relied upon by the School System in implementing the drug testing program was the prohibition of drug use or impairment on the job; (2) that there must be a nexus between the governmental interest and the testing performed; and yet (3) that the urine test administered by the School System upon Ms. Jones was incapable of detecting on-duty drug use. The School System now claims, for the first time in this case, that there is a reasonable connection between off-duty drug use and on the job impairment. The School System's argument, which is contrary to its judicial admissions and which is without any support in the record, is not a sufficient reason for the granting of a petition for writ of certiorari.

The record below establishes that Juanita Jones, a fifty-two year old grandmother of four, is a dedicated and model employee of the District of Columbia Public School System, and is not a user of drugs. *See Jones v. McKenzie*, 628 F. Supp. 1500, 1503 (D.D.C. 1986) (Petition for Writ of Certiorari Appendix ("Pet. App.") 18a); Interrogatory Answer No. 6 (Respondent's Supplemental Record Excerpts, filed with the Court of Appeals ("S.R.E.") 15, 20). Despite Ms. Jones' excellent work record, the School System, without any reason to believe that Ms. Jones used, possessed, or was under the influence of illegal drugs at any time, subjected her and hundreds of other employees of the School System's Transportation Branch to urinalysis testing for drug use

in the Summer of 1984. *Jones*, 628 F. Supp. at 1503, 1507 (Pet. App. 15a, 26a); Admission No. 8 (S.R.E. 15, 20). On the basis of a drug test result which erroneously indicated past use of marijuana, Ms. Jones was fired summarily from her employment as a school bus attendant and wrongfully branded as a drug user. *Jones*, 628 F. Supp. at 1503, 1505-06 (Pet. App. 18a, 21a-22a, 24a-25a).

Superintendent's Directive 205.1, which formally implemented the drug testing program, permits drug tests to be administered upon all Transportation Branch employees who undergo medical examinations or who, at the broad discretion of the Superintendent of Schools, display behavior deemed to be a "threat" or "detrimental" to the School System:

> Superintendent's Directive 662.13 prohibits the possession of, use of, or being under the influence of intoxicating liquors, narcotics or controlled substances by School System employees *while on duty*. The Directive provides that personnel found violating this Directive will be subject to termination and/or suspension. The Directive remains in full force and effect.
>
> In keeping with this long standing policy against the use of illicit narcotic drugs and controlled substances by employees of the D.C. Public School System *while on duty*, or being under the influence of such substances, I have instructed the appropriate staff to initiate forthwith testing procedures to insure compliance with this policy. This procedure will consist of urinalysis testing of all employees who are or will be required to undergo medical examinations to determine physical fitness for licensing and other employment-related reasons. Additionally, . . . any employee who displays behavior or actions which can be construed as a threat to the safety or well being of the students, staff, or public or are detrimental to the effective functioning of pro-

> grams and activities of the D.C. Public Schools may be directed for testing. . . .

Superintendent's Directive 205.1 (Petitioners' Record Excerpts, filed with the Court of Appeals, 39-40) (emphasis added).

It is significant that Superintendent's Directive 205.1, by its own terms, implements an earlier Superintendent's Directive which prohibits the use, possession, or being under the influence of illegal drugs on school premises. Superintendent's Directive 662.13 (S.R.E. 87). Despite the express language of both Superintendent's Directives in prohibiting only *on the job* drug use, however, the School System has admitted that the drug test administered to Ms. Jones was incapable of determining whether she used or was under the influence of drugs while on duty. *Jones*, 628 F. Supp. at 1503 n.2 (Pet. App. 22a).

Based on these facts, and other facts admitted by the School System, the District Court, upon Ms. Jones' Motion for Partial Summary Judgment, granted her requests for declaratory and injunctive relief, and ordered Ms. Jones' immediate reinstatement, with full back pay. The Court determined, among other things, that the School System "may not administer any urinalysis test for drug use to [Ms. Jones] without first establishing probable cause to believe that she is using or under the influence of illicit drugs based on specific objective facts." Order, dated February 25, 1986 (Pet. App. 30a). Although the District Court's Order applied to all testing—both as part of and outside of the context of a medical examination—the School System, in its appeal, subsequently abandoned any challenge to testing outside the context of a physical, and chose to focus its arguments on whether it could test for drugs as part of an annual medical examination. *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987) (Pet. App. 9a).

Limiting its holding to the narrow scope of the issue appealed by the School System, the Court of Appeals ruled that the analysis for drug use of a urine sample obtained pursuant to a routine medical examination constitutes a "search" under the Fourth Amendment. *Id.* at 338 (Pet. App. 7a-8a). The Court of Appeals, however, held that drug testing was "reasonable" under the Fourth Amendment provided that (1) the School System only tested employees whose duties have a direct impact upon safety; (2) testing is conducted as part of a routine employment-related medical examination; and (3) the test employed has a nexus to the employer's legitimate safety concern. *Id.* at 341 (Pet. App. 13a).

The Court of Appeals further ruled that the nexus requirement necessitated, in the instant action, that the School System use only a drug test capable of detecting on-the-job impairment. *Id.* (Pet. App. 12a-13a). The court reached this result after noting the following admissions by the School System: (1) that a compulsory drug test, in order to be lawful, must show a nexus to the employer's legitimate safety concern; (2) that the legitimate concern of the School System, under its regulations, was to prohibit employees involved in the transportation of handicapped children from being under the influence of drugs while on duty; and (3) that the test administered upon Ms. Jones could not detect whether an employee was using, in possession of, or under the influence of illicit drugs at the time of the test. *Id.* at 339-41 (Pet. App. 9a-12a). Accordingly, the Court of Appeals held that the School System could only administer a drug test capable of detecting current drug impairment. *Id.* at 339, 341 (Pet. App. 9a, 12a).

REASONS FOR DENYING THE WRIT

The constitutionality of urinalysis testing for illicit drugs is an issue of great public concern, as the Court has recognized in granting certiorari in *National Treas-*

ury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1072 (1988) (No. 86-1879). The present case, however, is not worthy of the Court's attention because the narrow issue presented by the Petitioners—whether the School System can administer drug tests upon certain individuals as part of a medical examination—can be sustained on non-constitutional grounds, without reaching the broad constitutional question posed by random drug testing of government employees.

The present case is further unworthy of the Court's attention because the court below clearly did not err in concluding that the School System was required to use a test which is capable of indicating whether an employee uses, possesses, or is under the influence of illegal drugs. The correctness of the court's decision is self-evident in light of the School System's admissions that its sole purpose in implementing the drug testing program was to prohibit drug use and impairment *on the job*, that there must be a nexus between this interest and the testing performed, and that the test used was incapable of satisfying the government's interest.

Specifically, the School System, in its Petition for Writ of Certiorari, does not dispute the Court of Appeals' fundamental holding that any test employed as part of its drug testing program must be one that has a "nexus" to the School System's legitimate safety concern. Indeed, the School System readily admitted at the oral argument before the Court of Appeals that there must be a nexus between the urinalysis test and the government objective in administering the test (Pet. App. at 34a). Now, however, the School System contends that the "nexus" is established through a purported relationship between off-duty use and impairment on the job. Its belated attempt to argue for a "prophylactic rule" which, by its own terms, is overly broad and not narrowly tailored to achieve the School System's legitimate purposes, is con-

trary to the School System's judicial admissions and unsupported by the record.

It was undisputed in the court below that the School System's sole justification for urinalysis testing for drugs was Superintendent's Directive 662.13, which prohibits use, possession, or being under the influence of illicit drugs while on school premises. *Jones*, 833 F.2d at 337, 341 (Pet. App. 4a, 12a). The School System made no attempt to assert any other interest in the District Court, including the "prophylactic rule" which it now claims as justification for its urinalysis testing program. The School System also admitted that the EMIT test, and similar tests which do not measure whether an employee uses, possesses, or is under the influence of drugs while on school premises, are incapable of detecting the activity with which the School System legitimately is concerned. *Id.* at 339, 339 n.10 (Pet. App. 19a); Oral Argument (Pet. App. 37a). Thus, the Court of Appeals properly held that the School System could no longer use the EMIT test or other tests incapable of measuring current impairment. *Id.* at 339, 341 (Pet. App. 9a, 12a).

The School System's "prophylactic rule" is also unsupported by any evidence in the record. There was not one shred of evidence presented by the School System in the record to support its belated argument that there is a nexus between off-duty drug use and on-duty impairment. Indeed, the District Court found that it is possible for a non-drug user to test "positive" for drugs due to "passive inhalation." *Jones*, 628 F. Supp. at 1503 (Pet. App. 17a). Therefore, there is no necessary correlation between off-duty drug use and positive test results. In the absence of any competent evidence, there is no basis for this Court or the Court of Appeals to justify future testing under the School System's "prophylactic rule" based on speculation concerning the relationship between off-duty use and job performance. *See United Paperworkers International Union v. Misco, Inc.*, 108 S.Ct. 364, 374

(1987) (no necessary connection between possessing a marijuana cigarette in a parking lot and using drugs while on the job).

Thus, even without reaching the constitutional questions presented, the Court of Appeals was clearly correct in concluding that based on the record before it, which included the express language of the School System's regulations and its own admissions, the School System could not test Ms. Jones unless the test used is capable of measuring current impairment. Accordingly, the Court of Appeals' decision is sustainable on non-constitutional grounds and is not appropriate for review by this Court.

CONCLUSION

For these reasons, the School System's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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